

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CYNTHIA SAUNDERS, et al.

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07 Civ. 830 (SAS)(KNF)

Plaintiffs,

vs.

THE CITY OF NEW YORK, et al.

Defendants.

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**AFFIDAVIT OF IVAN D.
SMITH IN SUPPORT OF
PLAINTIFFS' MOTION
FOR PARTIAL
SUMMARY JUDGMENT
AND IN OPPOSITION TO
DEFENDANTS' MOTION
FOR PARTIAL
SUMMARY JUDGMENT**

IVAN D. SMITH, an attorney duly admitted to practice law in the courts of this State and this Federal District, being duly sworn, deposes and states:

1. I am a partner with the law firm of Lewis Brisbois Bisgaard & Smith, LLP, attorneys for the Plaintiffs in the above-captioned action. Plaintiffs are approximately 208 current and former employees in the titles of Parent Coordinators ("PC") and Parent Support Officers ("PSO") employed by defendants the Department of Education of the City of New York and the City of New York (collectively referred to herein as (the "DOE" the "City" or "defendants").

2. Plaintiffs filed the complaint in this action on February 7, 2007, alleging four causes of actions. Plaintiffs allege that defendants violated the FLSA by (1) their failure to pay plaintiffs in cash at the rate of time and one half for hours worked over 40 in a workweek; (2) their failure to pay plaintiffs for hours worked between 35 and 40 in a workweek; (3) converting plaintiffs' compensatory time to sick leave after 90 days or otherwise preventing plaintiffs from using their compensatory time;¹ and (4) interfering and preventing plaintiffs from filing their claims under FLSA within the three year statute of limitations by failing to post official notices

that disclosed to plaintiffs their statutory right to be paid in cash at time and one half for overtime hours and by misinforming plaintiffs as to their statutory right to overtime pay.

3. On August 18, 2008, defendants moved for partial summary judgment on the following grounds: (1) the payment of compensatory time instead of cash for hours worked over 40 in a workweek does not violate the FLSA; (2) defendants permitted plaintiffs to use accrued compensatory time as requested or within a reasonable time after usage was requested unless the use caused an undue disruption to DOE's operation; and (3) that there is no evidence of an "actual practice" to pay plaintiffs straight time instead of time and one half for hours worked over 40 in a workweek.

4. Plaintiffs now move for partial summary judgment against defendants on the following grounds: (1) defendants are liable to plaintiffs for failure to pay for overtime in cash; (2) defendants are liable to those plaintiffs who were not compensated at all for hours worked over forty hours in a workweek; (3) defendants are liable to those plaintiffs who were paid at the straight time rate instead of the overtime rate for hours worked over 40 in a workweek; (4) the statute of limitations should be equitably tolled because defendants failed to post the required Department of Labor FLSA notices; and (5) plaintiffs are entitled to the application of a three year statute of limitations due to defendants' willful violation of the FLSA.

5. I submit this Affidavit in Support of Plaintiffs' Motion for Partial Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and in opposition to Defendants' Motion for Partial Summary Judgment dated August 18, 2008.

6. Annexed hereto as Affidavits, Declarations and Exhibits are documents and excerpts from deposition testimony taken in this action that are relied upon and cited in Plaintiffs' Response to Defendants' Statement of Undisputed Facts Pursuant to Local Civil Rule

56.1 dated August 18, 2008 and Plaintiffs' Statement of Undisputed Facts Pursuant to Local Civil Rule 56.1 in support of their Motion for Partial Summary Judgment dated September 9, 2008. These documents are as follows:

7. Annexed as Exhibit "A" is the Court's Order dated June 25, 2007.

8. Annexed as Exhibit "B" are excerpts of the deposition transcripts of selected plaintiffs including:

- excerpts of the transcript of deposition of Denise A. Gordon, taken December 5, 2007;
- excerpts of the transcript of deposition of Cynthia Saunders, taken November 19, 2007;
- excerpts of the transcript of deposition of Francine B. Palmieri, taken November 20, 2007;
- excerpts of the transcript of deposition of Rose Ann H. Guerrieri, taken November 19, 2007;
- excerpts of the transcript of the deposition of Lilly Chu, taken December 4, 2007;
- excerpts of the transcript of the deposition of Linda F. Sanders, taken December 4, 2007;
- excerpts of the transcript of the deposition of Henry Kinsey, taken on December 5, 2007 and;
- excerpts of the transcript of deposition of Rosemary Roman, taken November 20, 2007.

9. Annexed as Exhibit "C" are excerpts of the deposition transcripts of selected defense witnesses including:

- excerpts of the transcript of deposition of Caress Deville-Hughes, taken May 8, 2008;
- excerpts of the transcript of deposition of Sacha Ingles, taken May 9, 2008;
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- excerpts of the transcript of deposition of Elizabeth Knipfing, taken December 13, 2007;
- excerpts of the transcript of deposition of Julio Angel Lopez, taken December 7, 2007;
- excerpts of the transcript of the deposition of Susan Olds, taken December 7, 2007;
- excerpts of the transcript of deposition of Lawrence E. Becker, taken on May 6, 2008 and;
- excerpts of the transcript of deposition of Karen Feuer, taken on May 7, 2008.

10. Annexed as Exhibit "D" are the time and attendance records for plaintiff Virginia Temple.

11. Annexed as Exhibit "E" is the Declaration of Louis R. Lanier, PH.D., sworn to September 8, 2008 and Lanier's Exhibit A annexed thereto.

12. Annexed as Exhibit "F" is an excerpt of the Collective Bargaining Agreement between the DOE and Local 372, District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (April 1, 2000-June 30, 2005).

13. Annexed as Exhibit "G" is the Affidavit of Nola Booker, sworn to September 9, 2008.

14. Annexed as Exhibit "H" is the transcript of court conference held on May 27, 2008 in this action.

15. Annexed as Exhibit "I" is the letter dated May 22, 2008 from defendants to the Court.

16. Annexed as Exhibit "J" is the expert report of Dr. Christopher Erath, dated July 14, 2008.

17. Annexed as Exhibit "K" is the expert report of Louis R. Lanier, PH.D., dated June 16, 2008.

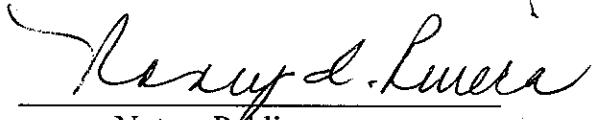
18. Annexed as Exhibit "L" is the Affidavit of Larry Davis sworn to September 8, 2008.

19. Annexed as Exhibit "M" is the Affidavit of June McMillan sworn to September 5, 2008 and McMillan's Exhibit A annexed thereto.

Dated: New York, New York
September 9, 2008


Ivan D. Smith (IS-2659)

Sworn to before me this
9th day of September 2008.



Notary Public

Nancy I. Rivera
Notary Public, State of New York
No. 01RI6058556
Qualified in New York County
Commission Expires 5/14/2011